

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>JOHN BRIDGES</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 216,067
<b>THOUSAND ADVENTURES, INC.</b>	)	
Respondent	)	
AND	)	
	)	
<b>TRUCK INSURANCE EXCHANGE</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appeals from the Award of Administrative Law Judge Nelsonna Potts Barnes dated March 22, 1999. The Administrative Law granted claimant medical treatment and temporary total disability compensation, but denied him a permanent award, finding claimant "is not a credible witness because of the inconsistencies in his testimony and in his actual physical performance on the video tape." Oral argument was held September 10, 1999.

**APPEARANCES**

Claimant appeared by his attorney, Robert R. Lee of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Eric K. Kuhn of Wichita, Kansas. There were no other appearances.

**RECORD AND STIPULATIONS**

The record and stipulations set forth in the Award of the Administrative Law Judge are adopted by the Appeals Board.

**ISSUES**

- (1) What is claimant's average weekly wage?
- (2) What is the nature and extent of claimant's injury and/or disability?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

**FINDINGS OF FACT**

Claimant was hired by respondent in Abilene, Kansas, to manage RV parks. Claimant originally worked in Abilene, Kansas, but was later transferred to Iowa, where he was located on the date of accident of May 15, 1995. On that date, while helping move a lawnmower, claimant injured his low back. Claimant underwent a series of treatments, including attempts at physical therapy and work hardening, and underwent conservative care for a substantial period of time. He was referred to Dr. Pedro Murati, a board certified physical medicine and rehabilitation specialist, in August 1996 by his attorney. Dr. Murati provided several months of treatment to claimant, including CT scans, myelograms, nerve conduction studies and other electromyographic studies. He also ordered a series of injections in claimant's back. None of the treatment resulted in any improvement. Ultimately, Dr. Murati assessed claimant a 20 percent whole body functional impairment.

Dr. Murati also ordered a work conditioning program and physical therapy, which claimant was unable to complete due to pain and physical limitations. Claimant continued working for respondent through June 22, 1996, at which time he was terminated from employment. That was the last time claimant worked or attempted to find work.

While working for respondent, claimant was paid a salary of \$1,000 a month and was provided a house to live in. Claimant estimated that the rental value on the house would be approximately \$500 to \$700 per month. Claimant acknowledged he was not educated in real estate or house valuations, testifying that his opinion was based upon the fact that friends of his lived in houses similar in size and build, and they paid approximately \$500 to \$700 a month for rent. Claimant also estimated that the utilities on the house would run between \$300 and \$325 per month. While claimant was unable to produce any utility bills, he did testify that he had seen the bills in the past and \$300 to \$325 a month was an average.

Respondent argues claimant is not a real estate agent and is not trained in the valuation of houses and, therefore, his opinion should be given no weight. Respondent further argues that claimant's opinion regarding the cost of utilities is, at best, a guess and highly inflated. However, respondent provides no contradictory evidence regarding either the rental value of the house or the cost of the utilities, even though this information would have been available to respondent, as the house was provided by respondent and the utility bills were paid through respondent's corporate office.

On June 22, 1996, the date of claimant's termination, claimant was advised that he needed to remove his belongings from the respondent's house. Claimant moved back to Arkansas City, Kansas, which is where he lived before originally being hired by respondent.

Claimant contends, since that time, he has had continuous low back problems and he cannot stand, sit or lie down for long periods of time.

On August 19, 1998, claimant was examined by Dr. Philip R. Mills as part of an independent medical examination ordered by the Administrative Law Judge. Dr. Mills assessed claimant a 5 percent whole body functional impairment. But after having the opportunity to review a videotape of claimant provided by respondent, Dr. Mills elected to place no limitations on claimant's ability to work. The videotape did not alter Dr. Mills' opinion regarding claimant's 5 percent whole body functional impairment.

Claimant was examined by Dr. Bernard T. Poole, an orthopedic surgeon in Wichita, Kansas, at respondent's request. Dr. Poole examined claimant and also had the opportunity to view the videotape. Dr. Poole found no indication claimant suffered any permanent functional impairment. He found no evidence of soft tissue injury, and no tenderness on palpation. He did not attribute the pain that claimant experienced at the L4-5 level and claimant's hamstring tightness to any specific injury. He also provided no permanent restrictions regarding claimant's ability to perform work. Dr. Poole found claimant in no distress. He acknowledged after viewing the videotape that he did not know how much the items weighed that claimant was moving and lifting.

The videotape in question was provided by Mr. Kim Voth of Clarence Kelley and Associates, an investigative firm. The videotape shows claimant on July 31, 1997, assisting two individuals installing a window air conditioner, and on August 21, 1997, assisting other individuals in unloading a flatbed trailer full of furniture. Claimant was observed moving several pieces of furniture, including end tables, couches and beds, from the flatbed trailer. The Administrative Law Judge, after reviewing claimant's testimony and reviewing the videotape, found claimant to lack credibility and awarded claimant no permanent disability as a result of his injuries with respondent.

#### CONCLUSIONS OF LAW

In proceedings under the Workers Compensation Act, the burden of proof shall be on claimant to establish claimant's right to an award of compensation by proving the various conditions upon which claimant's right depends by a preponderance of the credible evidence. See K.S.A. 1998 Supp. 44-501 and K.S.A. 1998 Supp. 44-508(g).

It is the function of the trier of facts to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of claimant and any other testimony that may be relevant to the question of disability. The trier of facts

is not bound by medical evidence presented in the case and has the responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

The parties acknowledge claimant was paid \$1,000 per month as a salary with respondent. The dispute centers around the value of the house claimant was provided as part of his compensation for working for respondent. Claimant estimated that the rent on the house would be between \$500 and \$700 a month, with respondent providing no contradictory evidence. Respondent argues that claimant is not a real estate agent and has no training in valuing property. Claimant's opinion is based upon rents paid in other areas by friends who lived in houses that were of similar size to the one provided to claimant in Iowa. The Appeals Board acknowledges that claimant is not an expert in the value of real estate but he did, nevertheless, provide an opinion regarding the proper value of rent on this property. Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976). The Appeals Board finds the proper value to be placed on the house is \$500 per month.

With regard to the cost of utilities paid by respondent, claimant could not produce copies of the bills but did state that he had seen the bills before they were provided to the corporate office for payment. He estimated that the average monthly cost of the utilities was between \$300 and \$325 per month. Again, respondent provides no contradictory evidence other than to argue that claimant is, at best, providing a guess. These bills were provided to corporate and paid by respondent's corporate headquarters. Therefore, the actual utility costs were available to respondent but respondent elected to provide nothing for the Court's review. The Appeals Board finds that claimant's opinion, based upon past-observed bills, is credible and that the appropriate monthly cost of the utilities was \$300 a month. In computing the total of the salary, rent and utilities, the Appeals Board finds claimant had an average weekly wage of \$415.38 per week.

With regard the nature and extent of claimant's injury and disability, the Appeals Board understands that the Administrative Law Judge found claimant was not credible because of the inconsistencies in his testimony. However, Dr. Mills, the independent medical examiner, after examining claimant and reviewing the videotape, still felt claimant had a 5 percent whole body functional impairment from the injuries to his back. Dr. Mills had the opportunity to view the videotape and elected to provide no restrictions to claimant's ability to work, but did find that certain physical limitations resulting from claimant's injury with respondent remained. The Appeals Board is aware that Dr. Poole found claimant had no functional impairment and Dr. Murati found a substantially higher functional impairment, but the Appeals Board finds Dr. Mills' opinion to be the least biased and the most credible in the record. The Appeals Board, therefore, finds claimant has a 5 percent whole body functional impairment as a result of the injuries suffered with respondent. The Board also finds that the opinion of Dr. Mills that claimant has no

limitations would result in a denial of work disability. This opinion is most credible and is adopted by the Appeals Board for purposes of this award.

However, were the Appeals Board to consider whether claimant would be entitled to a work disability under K.S.A. 44-510e, the Board would also have to consider whether claimant violated the policies set forth in Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997). In Copeland, the Court of Appeals held that, if a claimant, post injury, does not put forth a good faith effort to obtain employment, then the trier of fact is obligated to impute a wage based upon the evidence in the record as to claimant's wage earning ability. Claimant has made no effort to find employment since leaving respondent. The Appeals Board would not find this to be a good faith effort on claimant's part and an appropriate wage would, therefore, be imputed.

Jerry D. Hardin and Karen Crist Terrill, both vocational rehabilitation experts, provided opinions regarding claimant's ability to earn wages post injury. Mr. Hardin found claimant capable of earning \$260 a week which, when compared to claimant's average weekly wage of \$415.38, would result in a 37 percent loss of wage earnings. Ms. Terrill, on the other hand, found claimant capable of earning between \$373.60 and \$429.60 per week. In reviewing the evidence, the Appeals Board would find the opinion of Ms. Terrill to be more credible. As both amounts provided by Ms. Terrill would be 90 percent or more of claimant's average weekly wage, the Appeals Board would find claimant should be imputed a wage comparable to that he was earning at the time of his employment with respondent. Therefore, pursuant to K.S.A. 44-510e, claimant would be limited to his functional impairment.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated March 22, 1999, should be, and is hereby, modified, and an award is granted in favor of the claimant, John Bridges, and against the respondent, Thousand Adventures, Inc., and its insurance carrier, Truck Insurance Exchange, for an injury occurring on May 15, 1995, for a 5 percent whole body disability.

Claimant is entitled to 24.5 weeks of temporary total disability compensation, based upon an average weekly wage of \$415.38, and a weekly compensation rate of \$276.93 per week totaling \$6,784.79, followed by 20.28 weeks of permanent partial disability compensation at the weekly rate of \$276.93 totaling \$5,616.14, for a total award of \$12,400.93, all of which is due and owing and ordered paid in one lump sum minus any amounts previously paid.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings contained herein.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October 1999.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c:     Robert R. Lee, Wichita, KS  
       Eric K. Kuhn, Wichita, KS  
       Nelsonna Potts Barnes, Administrative Law Judge  
       Philip S. Harness, Director